FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 9 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 184.

SOLON L. FRANK AND SAMUEL FRANK, DOING BUSINESS UNDER THE NAME OF S. L. & S. FRANK,

Plaintiffs in error,

against

JOSEPH VOLLKOMMER, JR., AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JACOB VOGT, A BANKRUPT, AND JACOB VOGT,

Defendants in error.

BRIEF FOR PLAINTIFFS IN ERROR.

ROGER FOSTER,
Counsel for plaintiffs in error,
35 Wall Street,
New York.

[20,051]

FILE COPY

Supreme Court of the United States

SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. FRANK, Plaintiffs in Error, AGAINST JOSEPH VOLLKOMMER, Jr., as Trustee in Bankruptcy of the Estate of JACOB VOGT, a bankrupt, and JACOB VOGT. Defendants in Error.	October Term, 1906. No. 184.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is a writ of error sued out by two of the defendants below, which brings up for review a judgment of the Supreme Court of the State of New York, which provides as follows:

"IT IS ORDERED, ADJUDGED AND DECREED, that the chattel mortgage executed and delivered by Jacob Vogt, of the Borough of Brooklyn, County of Kings, to the above named defendants Solon L. Frank and Samuel Frank, of the City and State of

New York, April 16, 1902, to secure the sum of $8,500, with legal interest, and filed in the office of the Register of the County of Kings April 18, 1902, as No. 11,230 be, and the same hereby is, annulled and declared void and of no effect. That said Register, upon receiving a certified copy of this judgment, cancel the said chattel mortgage of record, and that *the said chattel mortgage be and the same is hereby adjudged* and declared *to be no lien upon the moneys*, viz., $5,481.47, *deposited* on July 9, 1902, by Arthur T. Stoutenburgh *in the* People's *Trust Company* of Brooklyn, N. Y., *under an order of the District Court of the United States* for the Eastern District of New York, made July 2, 1902" (p. 26, fols. 101–103).

This judgment, which was entered at Special Term, was unanimously affirmed by the Appellate Division of that Court for the Second Department (pp. 107–108). Leave to appeal to the Court of Appeals from this judgment was denied by Judge Bartlett of that Court (p. 116).

The complaint prayed judgment: that a certain alleged chattel mortgage be declared null and void; "that the alleged indebtedness intended to be secured thereby be declared null and void;" and that a fund deposited in the People's Trust Company under an order of the District Court of the United States for the Eastern District of New York sitting in bankruptcy, which directed that the deposit there "await the further order of the Court" be declared free of the lien or incumbrance of that chattel mortgage and free from any lien or claim by the defendants Frank, the mortgagees thereunder, or otherwise (p. 8).

The original defendants were the chattel mortgagees, the plaintiffs in error, Messrs. Frank, and the bankrupt mortgagor, Jacob Vogt, who did not answer the complaint, and who has refused to join in the writ of error, although duly requested so to do (pp. 117, 118), and who has been served with a citation (p. 126).

The chattel mortgagees were horse dealers on Manhattan Island (p. 92, fol. 365). The bankrupt was an expressman in Brooklyn, employed by owners of department stores and dry goods houses to carry goods to the customers and collect for the same on delivery (p. 32, fol. 128). The mortgagees had for many years sold him horses on credit and loaned him money (p. 92, fol. 366). At the time the chattel mortgage in suit was given the Franks held a previous chattel mortgage upon the same property to secure the sum of $3,800 which was still unpaid, and he owed them other money amounting to about $7,000 (p. 92, fols. 367, 368). The sum of $500 in cash was advanced at the time the second mortgage was executed (p. 94, fol. 375). They also, later, sold him horses on credit, and lent him money to a considerable amount (p. 97, fols. 375, 376), under an agreement made at the time the mortgage was executed; that such advancements should be made and credits given, and that the mortgage should cover the subsequent indebtedness thus arising (p. 93, fols. 369–371; p. 95, fol. 378; p. 102, fol. 405).

It appeared by the complaint and uncontradicted evidence, that, before the filing of the petition in bankruptcy, the mortgagees took possession of the mortgaged property, which consisted of horses, harnesses and wagons, with the consent and at the request of the bankrupt.

The bankrupt testified: "I called them up on the "telephone and told them that the bonding com- "pany thought that I had better stop doing busi- "ness, and they said they would send some one over "to foreclose the mortgage and take the possession "of the horses and my stable here. I made no ob- "jection to their doing so. I told them that they "could do so. I told them that two or three days "before that" (p. 57; see p. 43). The bankrupt thereupon absconded and remained in hiding till he was found and arrested by the marshal (pp. 50, 51, fols. 199-201; p. 47, fol. 187; p. 53, fol. 212).

His foreman, however, whom he left in charge,

delivered the horses to the deputy marshal sent by the mortgagees; and the bankrupt's employees wrapped up the blankets and harness so that the marshal could take them away (Vogt, p. 47, fol. 185; p. 57, fol. 226). This was in pursuance of a clause in the chattel mortgage authorizing the mortgagees so to act (p. 10, fol. 38).

The Messrs. Frank thereupon duly advertised the property for sale. Some of Vogt's creditors filed a petition in bankruptcy and procured the appointment of a receiver and an injunction against the sale (Vogt, p. 48, fol. 190; Yawger, pp. 63, 64, fols. 250–255; Cplt., pp. 4–6, fols. 15–24).

To prevent the horses from eating their heads off, the mortgagees were forced to consent to an order authorizing the immediate sale, and providing that their right to the proceeds be determined by the United States Court in Bankruptcy. That order, a copy of which is annexed to the complaint, after ordering the sale, directed "And it is further "Ordered, that said Temporary Receiver be and he "hereby is authorized and directed, within five "days from the date of said sale, to deposit in the "Peoples' Trust Company of Brooklyn, as a special "fund, *there to await the further order of the Court*, "upon due notice to all creditors who have or may "hereafter appear, the proceeds resulting from the "sale of said property, after the deduction of the "expenses of said sale, and that the lien, if any, of "the said alleged chattel mortgage of the said S. L. "and S. Frank, be transferred to and attached to said "special fund or deposit in lieu of, and to the same "extent that it attached to the said property herein-"before directed to be sold" (p. 14, fols. 53–54).

These proceedings disposed of the chattel mortgage by a foreclosure of the same; and gave to the Federal Court, by the express contract of the parties, the determination of all questions as to the title to the proceeds.

The trustee in bankruptcy instituted the proceedings in that Court with a view to obtaining the

fund. For that purpose he examined the bankrupt before the Referee in Bankruptcy and attempted to prove by his testimony, that the mortgage was fraudulent. This examination took place on September 26, 1902, a few months after the execution of the chattel mortgage.

The bankrupt then testified as follows in answer to questions put to him by the trustee's counsel:

"Q. Who asked you to make the mortgage? A. "Frank.

"Q. What did they say when they asked you to "make it? A. *I have forgotten now.*

"Q. They merely asked you to make this mortgage "as a renewal; that is all? A. That is about all" (Vogt, p. 55, fol. 219; p. 60, fol. 237).

The trustee in bankruptcy was dissatisfied with this testimony. If he had continued the litigation in the Federal court the case would undoubtedly have been tried before the Referee who heard the evidence or else before a jury. In order to obviate this and to obtain a fresh tribunal not impressed by that evidence he began this suit in the State court in a county where he lived and the mortgagees did not. Thereupon the trustee, who is one of the bankrupt's creditors to the amount of about $2,500, took the bankrupt into his employ at a salary nearly double of what Vogt received before (Vogt, p. 53, fol. 209; p. 77, fol. 306; p. 54, fol. 214).

Before he entered the plaintiff's employ Vogt told Mr. Samuel Frank that if he could get a thousand dollars he would get away and the Franks "win the case, he said he would leave the country." Mr. Frank refused to give him this (p. 95, fol. 380).

The plaintiffs in error offered to prove similar demands for money made by Vogt's wife, but the testimony was excluded under their objection (*Ibid.*).

The trustee and his counsel immediately discussed the case with the bankrupt (p. 54, fol. 214). The result of this employment and the other argu-

ments used at that discussion was a refreshment of the bankrupt's memory and a complete change of his testimony when called on the trial below while he was still in the trustee's employ. He then testified, prompted by leading questions, that about a week or ten days before the chattel mortgage was made he told Mr. Samuel Frank that he had been sued by three men for $20,000 damages for *bruises* only, there being no claim of sprains or broken bones, nor even of loss of blood.
alleged to have been caused by the negligence of his drivers (p. 34, fols. 134–135; pp. 36–40, fols. 143–160). Neither of these suits has ever been tried, nor has any claim upon them been proved in bankruptcy. He said, however, that the mortgage was made for the sake of defeating the claims of these two litigants and of protecting the Franks, to whom he was indebted for the sale of horses and for moneys loaned, and from whom he expected to incur other debts by subsequent loans and purchases (pp. 41–52, fols. 162–166). This story, which was in the highest degree improbable as well as contradictory to his previous testimony in the Federal court, was absolutely denied by Mr. Samuel Frank, who swore that he had never heard of these negligence cases before the trial (p. 92, fol. 367). If they had discussed defrauding and had intended to conceal his assets from any people, would those not have been acknowledged creditors of Vogt, such as the plaintiff, Wanamaker and the other persons who had employed him to deliver goods for cash on delivery, who have put him into bankruptcy, and who are paying the expense of the litigation; not three poor common laborers, whose claims were based upon a few bruises, and were disputed by Vogt, and whose suits have never been heard of since they were begun?

Vogt further testified, that, after the date of the chattel mortgage, he sold horses, first estimating the number as twenty-five, then ten, which were covered by the chattel mortgage and which were worn

out so as to be unfit for his business (p. 58, fol. 231; p. 59, fol. 234).

He at first said: "Mr. Frank gave me consent; some of them he bought of me himself. He did not tell me nothing, what to do with the proceeds" (p. 58, fol. 232). On further cross-examination, he admitted that he did not know whether Mr. Frank bought any of him after the chattel mortgage in question was made (p. 59, fol. 233). He bought new horses in their place. "I had to, because I need them in my business" (p. 59, fol. 235; p. 57, fol. 228; p. 52, fol. 207; p. 46, fol. 181). Mr. Frank positively denied that he consented to the sale of any horses covered by this last chattel mortgage (p. 93, fol. 371).

There is no proof in the case that any judgments have ever been recovered against the bankrupt by any one The trustee, consequently, has no rights except so far as he represents creditors whose claims have not been reduced to judgment.

In accordance with rule 11, we herewith submit

The specifications of the errors relied upon.

I.—The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in refusing to direct a dismissal of the complaint in the action below, for the reason that the Supreme Court of the State of New York had no rightful authority to grant relief in a suit brought to determine the title to property in the possession of the United States District Court; and, furthermore, because the defendant had a contractual right to have all questions concerning the title to the same determined by that Court.

II.—The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

III.—The said Appellate Division erred in refusing to direct the dismissal of said complaint for the reason that the plaintiff below had no right to sue to set aside a chattel mortgage in a case where he did not represent a judgment creditor of the mortgagor.

IV.—The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

V.—The said Appellate Division for the Supreme Court of the State of New York erred in refusing to set aside so much of the judgment of said Supreme Court, in the County of Kings, as adjudicated concerning the title to a fund, which had been deposited under an order of the District Court of the United States for the Eastern District of New York.

VI.—The Supreme Court of the State of New York for the County of Kings erred in making such an adjudication.

VII.—The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in affirming the judgment of the Supreme Court of the State of New York for the County of Kings, hereinbefore referred to.

I.

This Court has jurisdiction of the writ of error.

U. S. R. S., Sec. 709, provides that

> " A final judgment or decree in any suit in " the highest court of a State, in which a " decision in the suit could be had, * * *

"where any title, right, privilege or immu-
"nity is claimed under the Constitution, or
"any treaty, or statute of, or commission held
"or authority exercised under, the United
"States, and the decision is against the title,
"right, privilege or immunity specially set
"up or claimed, by either party under such
"Constitution, treaty, statute, commission or
"authority, may be re-examined and re-
"versed or affirmed in the Supreme Court
"upon a writ of error."

Leave to appeal to the Court of Appeals was denied by the Appellate Division (pp. 107–108); and subsequently by Judge Bartlett of the New York Court of Appeals (p. 116).

(*a.*) The plaintiffs in error, who were defendants below, claimed an immunity from suit in the State court; and the title, right and privilege to have all questions concerning their title to the fund realized at the sale by a receiver of the United States District Court and deposited in that Court, determined by such Court.

They made this claim by motion to dismiss the complaint at the opening of the trial (pp. 31, 32, fols. 123–125); by a similar motion at the end of the plaintiff's case (p. 82, fols. 328–330); at the end of the trial and again upon the appeal to the Appellate Division (Certificate of Presiding Justice, p. 114, printed as made with the endorsement on the motion papers); and also immunity under the bankruptcy law from a suit by a trustee, who did not represent judgment creditors, to set aside the chattel mortgage.

(*b.*) The Appellate Division, the judgment of which, as well as that of the Special Term, is brought up for review by the writ of error (pp. 124, 125), was the highest court of the State of New York in which a decision in the suit could be had.

The suit was brought to set aside a chattel mortgage.

Subdivision 2 of Section 191 of the New York Code of Civil Procedure provides as follows:

> "No appeal shall be taken to said Court
> "from a judgment of affirmance hereafter
> "rendered in an action to recover damages
> "for a personal injury, or to recover dam-
> "ages for injuries resulting in death, or in an
> "*action to set aside a* judgment, *sale, trans-*
> "*fer, conveyance, assignment or written in-*
> "*strument*, as in fraud of the rights of cred-
> "itors, or in an action to recover wages, sal-
> "ary or compensation for services, including
> "expenses incidental thereto, or damages for
> "breach of any contract therefor, or in an ac-
> "tion upon an individual bond or individual
> "undertaking on appeal, when the decision
> "of the Appellate Division of the Supreme
> "Court is unanimous, unless such Appellate
> "Division shall certify that in its opinion a
> "question of law is involved which ought to
> "be reviewed by the Court of Appeals, or
> "unless in case of its refusal to so certify, an
> "appeal is allowed by a judge of the Court of
> "Appeals."

The Appellate Division of the Supreme Court for the Second Department is, consequently, "the highest court of a State in which a decision in the suit could be had," as is provided by U. S. R. S., § 709.

II.

The plaintiffs in error had a contractual right to have all questions concerning the title to the proceeds of the receiver's sale, determined by the Court of Bankruptcy, which appointed the receiver, under whose direction the sale took place, and in whose custody the proceeds were deposited.

The order directing the sale, which was entered upon consent of all the parties interested, directed that the proceeds, after the deduction of the expenses of the same, should be deposited in the People's Trust Company of Brooklyn

> "as a special fund, there to await the further order of the Court upon due notice to all creditors who have or may hereafter appear."

This was the most solemn form of contract known to the common law, a contract of record.

The Messrs. Frank consented to the receiver's sale which they had the right to prevent, upon the express condition that their right to the proceeds should be determined by the Federal court. The State court had no right to nullify that condition.

It is a flimsy subterfuge, to argue: that this is not a suit to determine the title to the fund, but merely an action to determine the validity of the chattel mortgage; and that consequently the contract and order of the Court, did not prevent the determination of that question by the State tribunal. The order provided:

> "That the lien, if any, of the said alleged "chattel mortgage of the said S. L. & S.

> "Frank be transferred to and attached to "said special fund or deposit, in lieu of and "to the same extent that it attached to the "said property hereinbefore directed to be "sold" (p. 14).

The determination of the title to the chattel mortgage was necessarily also a determination of the Franks' title to the fund (see Point VIII., *infra*, p. 29). If the State court had jurisdiction to pass upon that question, the Federal court must necessarily be bound thereby and must follow the same. The order, however, expressly took the matter from the jurisdiction of the State court and transferred it to the Federal Court of Bankruptcy. The Franks had a right to insist that this order should be obeyed.

In *Havens & Geddes Co.* v. *Pierek* (C. C. A.), 120 Fed., 244, 245, a fire insurance policy owned by the bankrupt was by agreement with the assignee of the same

> "transferred to the trustee; and he agreed "to hold the money to be realized on the "policy 'for the benefit of said Havens & "Geddes Company,'" the assignee, "subject "to the order of the United States District "Court for the Southern District of Illinois. "*Per Curiam.* It was unquestionably the "right of the District Court upon petition of "the trustee—certainly upon notice to the "Havens & Geddes Company—to determine "the right to the fund, because such action "had been stipulated by the agreement which "it had made. * * * The stipulation of "the parties— * * * provided in effect, "for the covering of the fund into the Reg- "istry of the District Court to be dealt with "by that Court, *the rights of the parties "thereto to be determined upon summary "petition.*"

In *Guaranty Trust Co.* v. *North Chicago St. Ry. Co.*, 130 Fed., 801, 813, upon which the defendants in error rely; it was merely *held* that the pendency in a Federal court of a creditor's suit against a lessor street railway company, in which a receiver had been appointed, was not a bar to a stockholder's suit in the State court to which the receiver was not a party, for an injunction against the delivery of an amended lease agreed to by the directors, which released stocks deposited in trust by the lessee as security. The bill also prayed a receiver of the stock. The Court did not hold that this receivership might be granted as incidental to the other relief. It said (p. 813): "That this prayer for relief beyond the jurisdiction of the State court did not prevent the plaintiffs from prosecuting their suit for so much as the State court had power to grant."

III.

Irrespective of the provision of the order on which the plaintiffs in error had a right to rely, the State court had no power to make any order affecting the title to a fund in the possession of a court of the United States.

Every court with equitable powers, in whose possession property is placed, whether tangible property or a fund, has exclusive jurisdiction to determine the validity of all claims to a lien upon the same, and to distribute that fund amongst the rightful owners. No other court has any power to interfere with such property.

This rule of general as well as of Federal jurisprudence applies to proceedings in bankruptcy. The

prosecution of this suit in the State court might have been enjoined by the Court of Bankruptcy. The judgment is, consequently, subject to reversal by this Court.

(*a.*) The general principle is well stated by Mr. Justice Mathews in *Covell* v. *Heymen*, 111 U. S., 176, 182:

> "The forbearance which courts of co-
> "ordinate jurisdiction, administered under a
> "single system, exercise towards each other,
> "whereby conflicts are avoided, by avoiding
> "interferences with the process of each other
> "is a principle of comity, with perhaps no
> "higher sanction than the utility which
> "comes from concord, but between State
> "courts and those of the United States it is
> "something more. It is a principle of right
> "and of law, and therefore of necessity. It
> "leaves nothing to discretion or mere con-
> "venience. These courts do not belong to
> "the same system so far as their jurisdiction
> "is concurrent; and although they co-exist in
> "the same space they are independent and
> "have no common superior. They exercise
> "jurisdiction, it is true, within the same
> "territory but not in the same place; and
> "*when one takes into its jurisdiction a specific*
> "*thing that is as much withdrawn from the*
> "*judicial power of the other as if it had been*
> "*carried physically into a different territorial*
> "*sovereignty.* To attempt to seize it by a
> "foreign process is futile and void."

(*b.*) There is no difference in principle, nor in practical importance, so far as this rule is concerned, between a suit where the State court directs its officer to exercise physical interference with property in the custody of the Federal tribunal, and one in which the decree of the State court affects the

title only to the same, without taking manual possession thereof.

In each case, the judgment of the Court which acquired prior jurisdiction is impeded, clogged and interfered with. It is, moreover, for the interests of justice that conflicts between decrees of co-ordinate tribunals should be avoided; and that the parties should not be tempted by the hope of thus gaining some apparent and at least temporary advantage, to indulge in "an unseemly scramble of litigants to speed cases in the respective courts of their preference" (Mr. Justice Field in *Sharon* v. *Terry*, 36 Fed., 337, 359, *infra*).

It has been so held repeatedly by the Federal courts.

Where a sheriff sells land, he merely delivers a deed, which purports to confer title thereto, and he exercises no physical control over the same. Yet, such a sale will be enjoined by the court of the United States with prior jurisdiction (*Julian* v. *Central Trust Co.*, 93 U. S., 193).

In *Gordon Trust Co.* v. *Kansas City Southern Ry. Co.* (C. C. A.), 146 Fed., 337, 339, the Circuit Court of Appeals for the Eighth Circuit said, speaking through Judge Sanborn:

> "The trust company under its former
> "name, State Trust Company, commenced a
> "suit in the Circuit Court of Jackson County
> "to obtain a decree that certain indebtedness
> "of the Gulf company to it was prior in lien
> "and superior in equity, to that of the mort-
> "gage foreclosed in the court below; and
> "that court properly enjoined its prosecution
> "because the consideration and adjudication
> "was expressly retained within its exclusive
> "jurisdiction (*State Trust Co.* v. *Kansas*
> "*City, Pittsburg & Gulf R. Co.* (C. C.), 110
> "Fed., 1016)."

In *Sharon* v. *Terry*, 36 Fed., 337, 359, Mr. Justice Field (Sawyer and Sabin, *JJ.*, concurring), in a suit

to cancel a paper purporting to be a marriage contract, enjoined the enforcement of a judgment of a State court, in a suit begun after the Federal court had acquired jurisdiction, which adjudged that the defendant had acquired, through such a marriage, an interest in certain property of the original plaintiff:

> "Where two judgments, relating to the "same subject, are irreconcilable, both cannot be enforced. One or the other must "give way, and the only reasonable test by "which the superiority of one over the other "is to be determined is that which is expressed "in the authorities cited, that the court "which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired "possession of the subject, it cannot be "rightly ousted by subsequent proceedings "in another court having no supervising or "appellate authority. If the time of the "rendition of the judgment, independently "of the commencement of the suit, were to "be the test, the superiority of judgment, as "counsel well observe, would depend on "mere accident or circumstances beyond the "power of the court or parties; as one court "may have a large calendar, and be blocked "up with business, creating great delay in "the disposition of causes, while the other "court may have few causes, and those of "minor importance, and thus be enabled to "speedily dispose of them. It would give the "latter court pre-eminence, because it is enabled, from paucity of cases, to dispose of "its calendar at an earlier day, and might, "as suggested, tend to an unseemly scramble "of litigants to speed cases in the respective "courts of their preference."

So, in *Jordan* v. *Taylor*, 98 Fed., 643, *held*, conversely, that a Federal court had no jurisdiction of a suit to set aside a sale made by executors upon the ground that the State court of probate which issued to them letters testamentary thereby acquired exclusive jurisdiction.

(*c.*) This rule has been applied to bankruptcy proceedings.

It is imperatively necessary that the State courts should be obliged to respect this rule in cases affecting funds in the possession of the courts of bankruptcy, in order that the supremacy of the United States, when exercising that power expressly granted by the Federal Constitution, may be recognized.

In such cases the courts of the United States can even interfere with property in the possession of the State courts.

> *Tefft* v. *Sternberg*, 40 Fed., 2, 6; *Moran* v. *Sturges*, 154 U. S., 256; *The Willamette Valley* (C. C. A.), 66 Fed., 565; *In re Watts and Sachs*, 190 U. S., 1, 32.

If the State courts were empowered to interfere, directly or indirectly, with funds in the hands of a court of bankruptcy, they might easily nullify the provisions of the bankruptcy law and dissipate a bankrupt's estate by distributing the same among resident creditors who claimed liens and preferences which Congress had not intended.

In *Whitney* v. *Wenman*, 198 U. S., 539, 552; it was held that, where the property affected by a conveyance or other instrument, purporting to convey the title to the same, has come into the possession of the Court of Bankruptcy, that court has jurisdiction of a suit or proceeding to cancel the same, although the instrument of which a cancellation is prayed, was made before the bankruptcy proceedings.

There a trustee in bankruptcy filed in a District Court of the United States a bill in equity,

praying a declaration that certain warehouse receipts covering property of a bankrupt and issued before the bankruptcy proceedings were fraudulent and void, for an account of the proceeds of the sale of the goods covered by those receipts, made by the receipt-holder, who had obtained the same from the receivers in bankruptcy, and also for an account of the proceeds of certain accounts collected by the receivers and paid to the receipt-holder. After citing *Bardes* v. *Hawarden Bank*, 178 U. S., 524; *Mueller* v. *Nugent*, 184 U. S., 1; *White* v. *Schloerb*, 178 U. S., 542, and *Bryan* v. *Bernheimer*, 181 U. S., 188; this Court said, speaking through Mr. Justice Day (552),

> "We think the result of these cases is, in "view of the broad powers conferred in Sec- "tion 2 of the bankrupt act, authorizing the "bankruptcy court to cause the estate of the "bankrupt to be collected, reduced to money "and distributed, and to determine con- "troversies in relation thereto, and bring in "and substitute additional parties when "necessary for the complete determination "of a matter in controversy, that when the "property has become subject to the jurisdic- "tion of the bankruptcy court as that of the "bankrupt, whether held by him or for him, "jurisdiction exists to determine contro- "versies in relation to the disposition of the "same and the extent and character of liens "thereon or rights therein. This conclusion "accords with a number of well considered "cases in the Federal courts. *In re Whit-* "*ener*, 105 Fed., 180; *In re Antigo Screen* "*Door Co.*, 123 Fed., 249; *In re Kellogg*, 121 "Fed., 333" (553). "The court had posses- "sion of the property, and jurisdiction to "hear and determine the interests of those "claiming *a lien therein* or ownership "thereof."

In re McMahon, C. C. A., Sixth Ct., 147 Fed. R., 684, 685, 686:

Headnote: "A court of bankruptcy which, by its "trustee, has possessesion of real estate of a bank- "rupt, has jurisdiction to determine all questions "in respect to title or to liens thereon, and may "entertain and determine a suit or petition by "the trustee against a mortgagee of the property to "set aside the mortgage as one given within four "months prior to the bankruptcy and void under "Bankr. Act., July 1, 1898, Sec. 67*e*, 30 Stat., 564, "c. 541 (U. S. Comp. St., 1901, p. 3449)."

Lurton, *J.* (Severens and Cochran, *JJ.*, concurring):

"We are now dealing with the jurisdiction of the "District Court which had possession through its "trustee of the property of the bankrupt against "which the protesting petitioner asserts a mort- "gage lien. If the District Court having possession "of the *res* did not have jurisdiction to hear and "determine claims to or against the *res*, unless the "claimant should consent, what court did? Could "the petitioner go into the State court and there "assert his lien and then obtain a decree for its "enforcement and thus deprive the court of "primary jurisdiction of the control and custody "of the controverted property? The possession of "the *res* draws to the Court jurisdiction of all "questions in respect to title or liens, irrespective "of citizenship. *Krippendorf* v. *Hyde*, 110 U. S., "276; 4 Sup. Ct., 27, 28; L. Ed., 145; *Toledo & Rd.* "*Co.* v. *Continental Trust Co.*, 95 Fed. R., 497; "36 C. C. A., 155."

There is nothing in the bankruptcy law which takes such cases out of the rule that such jurisdiction is exclusive.

In *Bardes* v. *Hawarden Bank*, 178 U. S., 24, the goods affected by the suit were in the possession of the defendant before the proceedings in bankruptcy were instituted. This Court there said, speaking through Mr. Justice Gray (532):

> "*The jurisdiction of the courts of the* "*United States over all matters and pro-* "*ceedings in bankruptcy, as distinguished* "*from independent suits at law or in equity,* "*was of course exclusive.*"

In *White* v. *Schloerb*, 178 U. S., 542, it was held that, after an adjudication in bankruptcy no action can be brought in a State court to recover property in the possession of the Court of Bankruptcy. And such an action was enjoined by the Federal Court.

In re Whitener (C. C. A.), 105 Fed., 180, 185, 186, Pardee, *J.*:

> "As the property, the ownership of which "is in dispute, was in the possession of the "trustee in bankruptcy as a part of bank- "rupt's property to be duly administered, "the District Court had jurisdiction to issue "an injunction restraining the proceedings "under a sequestration issued from the Dis- "trict Court of Bowie County, Tex., at the "suit of Ramseur, plaintiff, against Rodgers, "trustee, and to compel the return of the "property to the trustee. See *White* v. "*Schloerb*" (178 U. S., 542; 20 Sup. Ct., 1007; 44 L. Ed., 1183).
>
> "The property being in the custody of "the District Court sitting in bankruptcy, "that court had jurisdiction to entertain the "intervention filed by Ramseur, claiming the "property, and to hear and determine the is-

"sues presented by the intervention, not only
"on general principles (see *Morgan's L. & T.*
"*R. & S. S. Co.* v. *Texas Cent. Ry. Co.*,137
"U. S., 171; 11 Sup. Ct., 61; 34 L. Ed., 625),
"but under the specific provisions of Section
"2 of the Bankruptcy Act of 1898."

In re McCallum, 113 Fed., 393, 394, 395:

"The present application is the ordinary
"case of a claim against a fund in the hands
"of a court, and such claims the Court in
"possession of the fund has the right to hear
"and determine. It is an incident to the
"power to distribute, and, except where this
"power is expressly so limited by competent
"authority that a claim to a share of the
"fund must be sent to some other court for
"determination, the Court that has posses-
"sion of the fund is the proper tribunal to
"decide all controversies concerning its
"ownership. I do not deny the jurisdic-
"tion of the State courts to determine con-
"troversies, in proper cases, between the
"trustee and adverse claimants; but this, I
"think is not such a controversy. The claim
"here is essentially that the applicant be de-
"clared to have a superior right to a certain
"part of a fund about to be distributed. He
"is not asserting that he can recover any
"personal chattels from the trustee. What-
"ever title he may have had to the rugs
"themselves is gone, and his claim in one
"character or the other, has been transferred
"to the proceeds. * * * I think he ought to
"pursue the claim where they can all be heard
"in defense of their rights. * * * The
"application for leave to sue the trustee in
"the State courts is refused."

Re Antigo Screen Door Co. (C. C. A.), 123 Fed., 249, 251, 252 (cited with approval, *Whitney* v. *Wen-*

man, 198 U. S., 539, *supra*), is on all fours with the case at bar.

Head note:

> "Any court having in its possession a fund "about which there is a controversy has in- "herent jurisdiction and power to determine "such controversy, to the exclusion of every "other court.
>
> "Where a mortgagee, in possession of "property of a bankrupt, surrenders it to the "trustee, reserving the right to assert his "lien against the proceeds, such proceeds are "held by the court as assets of the bankrupt "estate, and in dealing with the fund it acts "as a court of bankruptcy."

Prior to the filing of the petition in bankruptcy, two chattel mortgages had been executed by the bankrupt. The mortgagee took possession of the property and advertised the same for sale four days before the filing of the petition in bankruptcy.

JENKINS, *J.*, 251, 252, 253:

> "Here the petitioner was in possession of "property claiming under the chattel mort- "gages in question. It was agreed that the "property should be turned over to the trus- "tee for sale by him, the proceeds to be "covered into the registry of the bankruptcy "court, the right of property to follow the "fund. This being done, and the fund being "placed in the registry of the bankruptcy "court and in the bankruptcy proceedings, "did that court have the right to determine, "as a court of bankruptcy and in the bank- "ruptcy proceedings, the respective rights of "the parties to that fund? We take it that "any court, whether one of equity, common "law, admiralty, or bankruptcy, having in its

" treasury a fund touching which there is
" dispute, may, by virtue of its inherent
" powers, determine the right to the fund
" thus in its possession. Jurisdiction in that
" respect is an incident of every court (*Havens*
" *& Geddes Company* v. *Pierek, Trustee*
" (C. C. A.), 120 Fed., 244; *In re McCallum*
" (D. C.), 113 Fed., 393). If otherwise, every
" court would be subject to the control of the
" co-ordinate courts, working havoc to the
" independence of judicial authority. A fund
" so possessed is in *custodia legis*, and right
" to it may *only* be asserted and determined
" in the court which possesses it (*In re*
" *Kellogg* (D. C.), 113 Fed., 120). See *White*
" v. *Schloerb*, 178 U. S., 542; 20 Sup. Ct., 1007;
" 44 L. Ed., 1183. * * * The mortgaged
" property was in equity the property of the
" bankrupt, subject to such lien as the mort-
" gagee had thereon. If its value was in ex-
" cess of a valid lien, that excess would go to
" the trustee. When, therefore, the property
" was turned over to the trustee as the prop-
" erty of the bankrupt, subject to the lien,
" the trustee held the property and its pro-
" ceeds as assets of the bankrupt and in the
" bankruptcy proceedings. We think the
" case is wholly different from *Bardes* v.
" *Hawarden Bank*, 178 U. S., 542; 20 Sup. Ct ,
" 1000; 44 L. Ed., 1175, which was a suit by
" the trustee against a third party claiming
" adversely, while here the third party had by
" agreement turned over to the Court the
" property in dispute with the right reserved
" to follow the fund. That fund was poten-
" tially in the custody of the Court in the
" bankruptcy proceedings as assets of the
" estate and was subject to the disposition of
" the banpruptcy court in that bankruptcy
" proceeding, under Section 2 (7) of the Bank-
" ruptcy Act (Act July 1, 1898, 30 Stat., 546,

"C. 541; U. S. Comp. St. 1901, p. 3421), which "empowers the Court to 'cause the estates of "bankrupts to be collected, reduced to money "and distributed, and determine controversies "in relation thereto except as herein other- "wise provided.' We are the more inclined "to adopt this construction of the act because "thereby a speedy and inexpensive method is "afforded of determining controversies with "respect to a fund, and the policy of the "bankruptcy act, as we think, sanctions this "summary mode of procedure, the parties "consenting thereto."

Re Kellogg 113 Fed., 120, 124; affirmed, C. C. A., 121 Fed., 333; s. c., *Hewit* v. *Berlin Machine Works*, 194 U. S., 123 (approved *Whitney* v. *Wenman*, 181 U. S., 539, 552);

Held that a District Court of Bankruptcy had the power to determine the validity of a mortgage upon property of the bankrupt, when the mortgaged property was in the possession of the trustee.

The Circuit Court of Appeals said, speaking through Judge Townsend (121 Fed., 333, 336):

"The controversies in relation to the bank- "rupt estate, which, by reason of the limita- "tions referred to in the clause 'except as "herein otherwise provided,' do not come "within the jurisdiction of the bankruptcy "courts, are those where the trustee must "bring an independent suit to assert title to "money or property not in the possession or "control of the trustee. These conclusions "are in accord with the decisions under the "former Bankruptcy Act (*Ray* v. *Norse-* "*worthy*, 23 Wall., 128, 134; 23 L. Ed., 116)."

In the same case Judge Hazel said, in the District Court (113 Fed., 124):

"Where the property is in the actual pos- "session of the Court, the right to decide

"conflicting claims is paramount, if not in-
"herent, in the Court first acquiring posses-
"sion. * * * The proceeds of the sale of
"the mortgaged property, indeed the prop-
"erty itself before the sale was directed by
"the bankruptcy court—the mortgaged prop-
"erty—was in the custody of that Court. It
"was party of the *res* over which this forum
"gained control by virtue of the adjudication
"in bankruptcy. It was held by the trustee
"as part of the bankrupt's estate, and the
"District Court, therefore, had jurisdiction to
"hear and determine the issues presented in
"the nature of a claim to, or lien upon, the
"assets of the bankrupt estate (see also *In re*
"*Whitener*, 105 Fed., 180; *In re Matthews*,
"109 Fed., 603; *Carter* v. *Hobbs*, 92 Fed., 594;
"*Ryttenberg* v. *Schefer*, 131 Feb., 313; *Re*
"*Leeds Woolen Mills*, 129 Fed., 922; *Re Lu-*
"*cius*, 124 Fed., 455; *Central Tr. Co.* v.
"*Worcester Cycle Mfg. Co.*, 128 Fed., 483)."

Alabama Gold Life Ins. Co. v. *Girardy*, 9 Fed., 142:

HEADNOTE: "A State court cannot reach
"funds which have been made by an officer
"of a Federal court on execution." The marshal held money collected on execution. To a rule directing him to pay the same to the plaintiff or show cause, he answers that the fund in his hands have been attached under process from a State court; *held* that the attachment of the State court was void, and the rule was made absolute; directing the marshal to pay the money to the execution creditor.

(*d.*) The bankruptcy act expressly confers upon Courts of Bankruptcy, full power to determine all controversies in relation to estates of bankrupts, of

which the Court or its officers have taken possession. The only controversies of which State courts are given jurisdiction are those between trustees and persons claiming, adversely to them, property of which neither the trustees nor the receivers in bankruptcy preceding them have taken possession.

Clause 7 of Section 2 of the Bankruptcy Act (30 St. at L., 544, 545) provides:

> "That the courts of bankruptcy have such "jurisdiction at law and in equity as will "enable them to exercise original juris- "diction in bankruptcy proceedings * * * "to (7) cause the estates of bankrupts to be "collected, reduced to money and distributed, "and determine controversies in relation "thereto, except as herein otherwise pro- "vide."

General Order XXIX., provides: that no money deposited under the orders of the Court of Bankruptcy "shall be drawn from the depositary, unless "by check or warrant, signed by the clerk of the "court, or by a trustee and countersigned by the judge "of the court, or by a referee designated for that "purpose, or by the clerk or his assistants under an "order made by the judge."

General Order XXVIII., gives power to the court of bankruptcy, to determine questions concerning the redemptions and discharge of "any mortgage "by them, pledged or deposited upon a lien upon "any property real or personal" of the bankrupt.

In the present case the estate of the bankrupt consisting of the horses, harness and wagons in question, has been reduced to money by the Court of Bankruptcy. That same court has the exclusive jurisdiction to determine controversies in relation thereto.

It was held in *Bardes* v. *Hawarden Bank*, 178 U. S., 524, 535, that:

> "Those words 'herein otherwise provided' "in clause 7, evidently refer to Section 23

" of the act. That section, it has been held, " in decisions of this court, subsequent to the " Bardes case, applies only to suits which " affect the title to property which has not " been brought within the jurisdiction of the " court of bankruptcy."

In the *Bardes* case an accounting was sought as well as the cancellation of a conveyance.

In *Bush* v. *Elliott*, 202 U. S., 477, 479, this court said, speaking through Mr. Justice Day: " In later " cases it has been held that the decision did not ex- " tend to cases wherein the bankrupt court had ac- " quired jurisdiction over the subject matter of the " property as that of the bankrupt, as to which the " bankrupt courts have been held to have jurisdic- " tion under the power conferred in subdivision " seven, section two, of the act."

That subdivision 7 of Section 2 applies to the case at bar, is held in the authorities cited under (*b*,) *supra;* amongst others *Whitney* v. *Wenman*, 198 U. S., 539; *In re Whitener* (C. C. A.), 105 Fed., 180; *In re McCallum*, 113 Fed., 393; *In re Antigo Screen Door Co.* (C. C. A.), 123 Fed., 249; *In re Kellogg*, 113 Fed., 120; S. C. C. A., 121 Fed., 333; *Havens & Geddes Co.* v. *Pierek*, C. C. A., 120 Fed., 244.

The jurisdiction given to the State courts in suits by trustees applies only to suits against persons claiming property adversely to the bankrupts' representative.

Mueller v. *Nugent*, 184, U. S., 1; *Matter of Muncie Pulp Co.* (C. C. A.), 139 Fed., 546.

(*e.*) It makes no difference whether the objection to the jurisdiction of the State court is made by the trustee or by a claimant to a part of the fund in the Court of Bankruptcy. Each alike can assert the right to have his title adjudicated by the Court of Bankruptcy.

Here, the grievance of the plaintiffs in error is

clearly apparent, since after the trustee had instituted proceedings upon the subject in the Court of Bankruptcy, and had been met there by testimony which seemed fatal to his contention; he abandoned that litigation and sought a fresh tribunal, which he considered would be less affected by the self-contradiction of the witness, when testifying a second time, than one which had seen and heard the testimony upon the first examination.

IV.

The fact that the State court acted beyond its powers, and that its judgment is void and would not be binding collaterally, is no reason why this Court should not adjudicate the transgression and set aside the void decree.

It was suggested by the Presiding Justice of the Appellate Division on the argument: that, if our position was correct and the judgment of the State court was void and would not be binding upon the Federal court when an application was made for the payment of the fund; we could not be prejudiced nor aggrieved by the existence of such an invalid judgment.

Judgments of this character by the State courts have frequently been reversed by this Court upon writ of error.

Thus, it has been held that the State courts have no power to issue a writ of replevin to recover property in the custody of a marshal of the United States; that such a writ is void; and that a judg-

ment of a State court in an action thus begun will be reversed by this Court.

Freeman v. *Howe*, 24 How., 450; *Covell* v. *Heymen*, 111 U. S., 176.

In *Covell* v. *Heymen*, 111 U. S., 176, 182; quoted more at length, *supra*, p. 14, Mr. Justice Mathews said, speaking for this Court upon the reversal of the judgment of the State tribunal:

> "When one takes into its jurisdiction a "specified thing, that is as much withdrawn "from the judicial power of the other, as if "it had been carried physically into a differ- "ent territorial sovereignty. To attempt to "seize it by foreign process is futile and void."

After a petition for a removal with the requisite bond has been duly filed, the State courts have no further jurisdiction to proceed with the case. Should they attempt to exercise such jurisdiction their proceedings may be enjoined by a court of the United States (*Abeel* v. *Culberson*, 56 Fed., 329; *Wagner* v. *Drake*, 31 Fed., 849; *Baltimore & O. R. Co.* v. *Ford*, 35 Fed., 170). Yet such subsequent proceedings will be reversed by this Court upon a writ of error (*Removal Cases*, 100 U. S., 457; *Southern Ry Co.* v. *Allison*, 190, 326).

Should the judgment below be allowed to stand, it would undoubtedly be followed by the Court of Bankruptcy.

V.

The execution of the mortgage for a larger amount than was then due in order to provide for future indebtedness was no badge of fraud.

It is well known that mortgages are frequently so made in the course of business.

Frost v. *Warren*, 42 N. Y., 204; *Truscott* v. *King*, 6 N. Y., 147.

VI.

The surrender of the chattels by the mortgagor to the mortgagees cured any previous defects or fraud in the chattel mortgage.

Castleman vs. *Mayer*, 55 App. Div., 515; aff'd. 168 N. Y., 354.

VII.

There is nothing in the Federal Bankruptcy Law which gives the State court jurisdiction in cases of this character.

The limitation in Section 23 is upon the jurisdiction of the Circuit Courts alone, and does not affect the powers of District Courts in bankruptcy. It applies only to plenary suits begun by the service of a common law writ or the equitable process of subpœna; "*as distinguished from proceedings in bankruptcy*," not to summary proceedings instituted by petition against property, or a fund in the possession of the Court (*Havens & Geddes Co.* v. *Pierek* C. C. A), 120 Fed., 244, 245, quoted *supra*, p. 12).

VIII.

The case cannot be sustained as an action to set aside the chattel mortgage.

The chattel mortgage was no longer in existence. The action of the Franks in taking possession of the property amounted to a foreclosure of this mort-

gage; and that foreclosure, if then imperfect, was completed by the receiver's sale. The chattel mortgage thereupon ceased to exist and became of no effect, except as evidence of the plaintiffs' rights in the fund in the possession of the Court of Bankruptcy. As a mortgage, its functions had ceased. The validity of the rights thereunder would not have been affected by the failure to refile the same at the end of a year, as is required to keep chattel mortgages alive under the New York statute. A judgment setting the same aside, which did not, as is the case of that brought up for review, expressly attempt to cancel the lien upon the fund in the possession of the Court of Bankruptcy, would have been mere *brutum fulmen*, and could have had no effect.

This action could not be supported, as was claimed below, as a suit to remove a cloud upon the plaintiff's title. Such a suit can only be maintained by a party in possession of vendible property to cancel a document which clouds the title thereto, so that it is not marketable and cannot be sold.

The plaintiff's interest in the fund here is not vendible nor marketable. The case, consequently, falls under no head of equitable jurisdiction.

If we dig to the root of the matter, pushing aside legal nomenclature, it is clear that the rights of the mortgagees are now entirely different from those secured by the mortgage. While the chattel mortgage was in existence, the rights of the Franks were to take possession of the property, sell the same and keep so much of the proceeds as was necessary to satisfy the amount owed them by Vogt. By the proceedings in the Court of Bankruptcy, they surrendered all these rights and received others in exchange. They have surrendered the possession of the property giving it to the receiver. They no longer have the right to sell the horses, wagons and harness. They have allowed the receiver to sell the same. They have voluntarily given up the legal title to the property which as chattel mortgagees, was vested in them. All the rights that they have

now are the new ones guaranteed them in exchange for these surrenders: the right to have the Court in Bankruptcy exclusively determine whether in equity they are entitled to the proceeds of the same.

IX.

The trustee had no right to attack the validity of the chattel mortgage.

It nowhere appears that the trustee represented any but contract creditors. He consequently had no right, which they could not exercise. Since they could not have sued to set aside this conveyance for fraud, he was equally powerless.

In *York Manufacturing Co.* v. *Cassell*, 201 U. S., 344, 352, Mr. Justice Peckham said:

> " Under the provisions of the bankrupt act
> " the trustee in bankruptcy is vested with no
> " better right or title to the bankrupt's prop-
> " erty than belonged to the bankrupt at the
> " time when the trustee's title accrued. At
> " that time the right, as between the bank-
> " rupt and the York Manufacturing Company,
> " was in the latter company to take the ma-
> " chinery on account of default in the pay-
> " ment therefor. The trustee under such
> " circumstances stands simply in the shoes of
> " the bankrupt and as between them he has
> " no greater right than the bankrupt."

This Court then cited with approval *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, which held; that a trustee in bankruptcy could not take advantake of the New York Statute of Frauds concerning the sale of personal property, because " the trustee was not " a subsequent purchaser, pledgee or mortgagee in

" good faith." The last case affirmed, *In re Kellogg*, 112 Fed., 52; s. c. (C. C. A.), 118 Fed., 1017.

In re New York Economical Printing Co. (C. C. A.), 110 Fed., 514, s. c. 112 Fed., 52; *held*, that a trustee in bankruptcy could not sue to set aside a chattel mortgage because of a failure to comply with the New York statute.

X.

The judgment should be reversed, with costs, and the Special Term of the Supreme Court of the State of New York should be directed to enter judgment in favor of the defendants dismissing the complaint, with costs, in this Court, and in the Court below.

ROGER FOSTER,
Of Counsel for Plaintiffs in Error.